



CRAG LAW CENTER

LEGAL AID FOR THE ENVIRONMENT SINCE 2001

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April 10, 2019

Via Certified Mail - Return Receipt Requested

Managing Agent
Ross Island Sand & Gravel Co.
4315 S.E. McLoughlin Boulevard
Portland, Oregon 97202

Mr. Randall H. Steed, President
Ross Island Sand & Gravel Co.
P.O. Box 82249
Portland, Oregon 97282

Managing Agent
Ross Island Sand & Gravel Co.
Tait Plant
2611 S.E. 4th Avenue
Portland, Oregon 97202

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EPA Region 10

Office of the Regional Administrator

Re: Notice of Intent to File Suit for Alleged Violations of the Clean Water Act

Dear Managing Agent:

This letter provides Ross Island Sand & Gravel Co. (hereinafter "RISG") with sixty days' notice of the Northwest Environmental Defense Center's intent to file a citizen lawsuit against RISG under Section 505 of the Clean Water Act, 33 U.S.C. §1365, for alleged violations of the Clean Water Act that are described in this letter and occurring at RISG's facility at or near 2611 S.E. 4th Avenue, Portland, Oregon 97202 (hereinafter "facility"). RISG is responsible for the alleged violations described herein because RISG owns and/or operates the facility.

The Northwest Environmental Defense Center ("NEDC") is an independent non-profit organization working to protect the environment and natural resources of the Pacific Northwest. NEDC is committed to improving water, land, and air quality through various programs including public education, volunteer water quality monitoring, and advocacy for and enforcement of strong environmental protection laws. Crag Law Center and Kampmeier & Knutsen PLLC represent NEDC in this matter and any response to this notice of intent to sue should be directed to us at the addresses listed below.

I. THE CLEAN WATER ACT

Congress enacted the Clean Water Act (“CWA” or “Act”) in 1948 to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. §1251(a). In doing so, Congress declared a national goal of eliminating “discharges of pollutants” to navigable waters by 1985. To effect that policy, and as relevant here, Section 301(a) of the Act prohibits discharges of pollutants unless they are in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit issued by the U.S. Environmental Protection Agency (“EPA”) or an authorized state. *See* 33 U.S.C. §§ 1311(a), 1342.

The CWA defines the term “discharge of a pollutant” in part as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The Act defines the term “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *Id.* § 1362(14). And the Act defines the term “pollutant” to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial...waste discharged into water.” *Id.* § 1362(6).

Similarly, but separately, “stormwater discharges associated with industrial activity” that are not authorized by an NPDES permit also violate Section 301(a) of the Act. *See id.* §§ 1311(a), 1342(p)(3)(A). EPA has defined the term “stormwater discharge associated with industrial activity” to include stormwater discharges associated with concrete operations categorized in Standard Industrial Classifications (“SIC”) 3273 and 3272, as well as facilities in SIC code 3295. *See* 40 C.F.R. § 122.26(b)(14). The term also covers and requires NPDES permits for facilities like RISG’s that manufacture, transport, or stockpile sand, gravel, aggregate, wet concrete, dry concrete, or similar materials, or products manufactured with those materials, irrespective of whether the facility is currently producing concrete, because such facilities are included within other SIC codes listed in EPA’s stormwater rule *and* because the term “stormwater discharge associated with industrial activity” includes “areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.” *Id.* Discharges of pollutants and industrial stormwater from the facility that are not authorized by an NPDES permit are illegal and in violation of the CWA even if routed to City of Portland storm drains. *See, e.g.,* 40 C.F.R. §§ 122.26(a)(2), (a)(3)(iii), (4).

II. ALLEGED VIOLATIONS OF THE CLEAN WATER ACT BY RISG

NEDC hereby alleges that RISG has violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants and stormwater associated with industrial activity from point sources at RISG’s facility at or near 2611 S.E. 4th Avenue, Portland, Oregon 97202 (hereinafter “facility”) to the Willamette River without authorization of an NPDES permit. RISG is in ongoing violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), which is an “effluent standard or limitation” as that term is used in the CWA. *See* 33 U.S.C. §§ 1365(a)(1), (f). Any and all discharges of pollutants from the facility are unpermitted and so unlawful under the CWA. Additionally, because RISG conducts industrial activities at the

facility—including manufacturing dry and wet concrete and other products, moving, sorting, and storing industrial materials like gravel, sand, roofing granules, and aggregate, vehicle and equipment fueling, and washing equipment including trucks—any stormwater discharged from the facility, whether polluted or not, is exposed to industrial activity and so is a “stormwater discharge associated with industrial activity” that is unlawful if not authorized by an NPDES permit.

All stormwater discharges from the facility are from point sources because the facility routes, controls, conveys, and collects stormwater using a comprehensive stormwater management system that includes grading, berms, curbs, drains, pipes, ditches, channels, hoses, pumps, and other man-made conveyances. As explained in RISG’s November 3, 2017 Stormwater Pollution Control Plan, stormwater from Drainage Area 1 at the facility flows to the southern end of the site, where it is collected by a series of retention and settling basins; stormwater from Drainage Areas 3 and 4 is captured by either catch basins or grated drains; Drainage Area 5 is graded such that all stormwater runoff from the site entrance and the vicinity of the dry-mix material warehouse flows north along S.E. 4th Avenue to a catch basin located at the intersection of S.E. 4th Avenue and S.E. Division Place; and stormwater at Drainage Area 6 is routed into the Willamette River. Because of RISG’s comprehensive and longstanding stormwater management at the facility, any addition of stormwater from the facility to the Willamette River is a point source discharge, not nonpoint source runoff from the facility.

Unfortunately, stormwater, process water, waste water, and other discharges from the facility almost certainly contain pollutants commonly associated with industrial activities, including but not limited to sand, dirt, copper, zinc, heavy metals, oil and grease, process water, waste water, total suspended solids, calcium carbonate, other metals, heat, and elevated pH levels. Trucks and heavy equipment and their tires are potential sources of zinc, copper, and other metals; leaks from trucks and fuel spills are a potential source of oil and grease; stormwater exposed to aggregate materials is a potential source of total suspended solids, calcium carbonate, and settleable solids in stormwater; building roofs at the facility are a potential source of zinc and other pollutants; and uncured concrete and concrete washout are a potential source of elevated pH.

The alleged violations of the Act at the facility are described herein and are ongoing. Information concerning the specific dates of violations, pollutant amounts, and exact or approximate locations of the discharges since 2014 is in the possession of RISG and largely unavailable to NEDC; consequently, below we describe the nature of the discharges with as much specificity as possible to notify RISG of the violations being alleged and to give RISG an opportunity to comply with the CWA during the notice period, rendering a lawsuit unnecessary. That said, however, NEDC hereby notifies RISG that any point source discharge of pollutants or industrial stormwater from the facility violates Section 301(a) of the CWA and NEDC intends to sue for all such violations occurring at the site whether or not specifically described herein.

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A. Discharges of Pollutants and Stormwater Associated with Industrial Activity Documented by State Agencies.

The State of Oregon and City of Portland have both documented discharges of pollutants and industrial stormwater from the facility that violate the Clean Water Act. First, RISG violated Section 301(a) of the Act on February 29, 2016, by discharging pollutants and industrial stormwater to the Willamette River from a PVC pipe draining settling basins at the south end of the facility; from another part of the settling basins at the facility; from a concrete basin near the settling basins, which was discharging cement slurry or something similar to the river; via leakage from the settling ponds and concrete basins at the facility; and from a holding basin near the settling ponds that is made of jersey barriers and that allowed materials and water in the basin to leak out and down to the Willamette River.

Second, RISG violated Section 301(a) of the Act on October 20, 2017, by discharging pollutants and industrial stormwater to the Willamette River from Tunnel Five through a pipe to the Willamette River; via leaks in an industrial hopper; via seeping and leaking through the containment wall of settling basin three; via flow from the facility entrance area to the City of Portland storm drain north of the facility on S.E. 4th Avenue at or near the intersection of S.E. 4th Avenue and S.E. Division Place; and via flow from gravel and sand piles north of the crane and flowing southwest to the Willamette River.

B. Discharges of Pollutants and Stormwater Associated with Industrial Activity to the Willamette River Via the City of Portland Storm Drain.

RISG violated and is violating Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging pollutants and stormwater associated with industrial activity from the facility to a City of Portland storm drain north of the facility on S.E. 4th Avenue at or near the intersection of S.E. 4th Avenue and S.E. Division Place. The City storm drain at this location ultimately drains to the Willamette River, most likely at City outfall number 31, so all discharges of pollutants and industrial stormwater from the facility to this storm drain constitute illegal discharges by RISG to the Willamette River. Illegal discharges of stormwater associated with industrial activity from the facility to the storm drain occurred on April 28, 2018 and on every day since April 10, 2014 on which more than 0.1 inches of precipitation falls or fell at the facility. In addition to stormwater discharges, illegal discharges of pollutants to the storm drain occurred on February 22, 2016, May 25, 2016, and occurred and are occurring every day that RISG washed trucks or equipment or took other actions that result in process water, wash water, or other waters or pollutants being routed and channeled to the storm drain or to any other storm drain. Discharges of pollutants and industrial stormwater to the storm drain described in this paragraph and the Willamette River are ongoing, unpermitted, and in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

C. Discharges of Pollutants and Stormwater Associated with Industrial Activity from RISG's Settling Ponds to the Willamette River.

RISG also violated and is violating Section 301(a) of the Act, 33 U.S.C. § 1311(a), by discharging pollutants and stormwater associated with industrial activity from settling ponds at

the facility to the Willamette River. RISG's facility has settling basins, or sumps, on the southern end of the facility, located adjacent to and just uphill from the Willamette River. Using pipes and other manmade conveyances, these settling basins collect industrial stormwater from the site and also collect wastewater from truck washing and other activities at the facility.

Stormwater collected in the sumps is exposed to industrial activities at the facility and also almost certainly polluted with several pollutants often associated with materials storage and concrete manufacturing, including suspended solids, aluminum, lead, arsenic, cadmium, chromium, mercury, other heavy metals, and oil and grease. Additionally, wastewater collected in the sumps from washing concrete trucks or manufacturing concrete almost certainly has elevated pH values. Accordingly, any discharge from the settling ponds to the Willamette River will contain pollutants and stormwater associated with industrial activity.

RISG violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants and industrial stormwater from the settling ponds to the Willamette River in at least four ways. First, RISG uses pipes, hoses, ditches, channels, and other conveyances, including the settling ponds themselves, to discharge pollutants and industrial stormwater from the settling ponds to the Willamette River. These kinds of discharges occurred on April 30, 2008, February 24, 2016, February 29, 2016, April 4, 2017, February 12, 2019, and on every day that RISG uses or used pipes, hoses and other conveyances to move some or all of the water and materials in the settling ponds out of the ponds and onto the adjacent ground, including when the settling ponds overflowed, where the water or pollutants then travel to the Willamette River. These violations are ongoing.

Second, RISG discharges pollutants and industrial stormwater to the Willamette River via leaks in the settling ponds. On February 29, 2016, DEQ inspector Michael Kennedy visited the site and observed fractures along the walls of the settling basins where wastewater was seeping through, as well as a well-defined discharge channel from the settling basins to the Willamette River. On October 20, 2017, DEQ and City of Portland Bureau of Environmental Services ("BES") again inspected the facility and confirmed that water collected in the settling basins continued to leak from the walls of settling basin 3. Evidence available to NEDC, including an administrative order from DEQ, indicates that RISG has not mended the cracks in the outer walls of settling basin three.

RISG has violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants and industrial stormwater from the settling ponds to the Willamette River via leaks every day since April 10, 2014 that the settling basins have stored water. Leaks from the settling ponds to the Willamette River violate the CWA whether the stormwater or pollutants travel over land to the river or percolate into the ground or groundwater before reaching the river. *See Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018). These kinds of discharges occurred on February 29, 2016, March 11, 2016, October 20, 2017, and occurred and are occurring every day since April 10, 2014 on which RISG stored water in the settling basins. These violations are ongoing.

Third, because leakage from the settling basins, nearby concrete basins, and possibly other activities has left a residue of materials and pollutants outside the settling basins on RISG

property and the banks of the Willamette River, and because precipitation landing on those areas will or may move some of that residue to the Willamette River, RISG has violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants and industrial stormwater to the Willamette River every day since April 10, 2014 on which more than 0.1 inches of precipitation falls or fell at the facility. These violations are ongoing.

Fourth, RISG violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by using pipes, hoses, and sprinklers to distribute industrial stormwater and pollutants in the settling ponds onto materials, areas, and aggregate piles, including to Drainage Area 6 at the facility, in a manner that results in surface discharges to the Willamette River. NEDC alleges these discharges occurred and are occurring every day that RISG distributed water collected in the settling basins at the facility using sprinklers or hoses in a manner that resulted in surface flow to the Willamette River. The exact dates on which RISG caused its sprinklers to discharge to the Willamette River are unknown to NEDC but known to RISG. These violations are ongoing.

D. Discharges of Pollutants and Stormwater Associated with Industrial Activity to the Willamette River from Other Conveyances at the Facility.

RISG also violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants and industrial stormwater from other conveyances at the facility to the Willamette River. RISG has claimed that it collects and reuses all stormwater and wastewater generated at the facility; however, information available to NEDC strongly suggests that is highly unlikely and that RISG in fact regularly discharges pollutants and industrial stormwater from numerous point sources at the facility, including channels on aggregate piles, leaking equipment such as industrial hoppers, tunnels, hoses, pipes, ditches, and channels.

For example, RISG violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants and stormwater associated with industrial activity to the Willamette River from Tunnel Five and from a leaking industrial hopper at the facility. Tunnel Five collects and conveys pollutants and industrial stormwater to WR-548, which discharges to the Willamette River. According to DEQ's report of its October 20, 2017 inspection of the facility, the leaking industrial hopper also discharged to the Willamette River. RISG violated Section 301(a) of the Act by discharging pollutants and industrial stormwater to the Willamette River from Tunnel Five and the leaking industrial hopper every day on which more than 0.1 inches of precipitation fell at the facility from April 10, 2014 until October 27, 2017. If Tunnel Five and/or the industrial hopper identified in DEQ's report are still discharging to the Willamette River, then these violations are ongoing and in violation of Section 301(a) of the CWA.

As another example, RISG discharges pollutants and industrial stormwater to the Willamette River from point sources in or near the area identified as "Drainage Area 6" in RISG's NPDES permit application. RISG uses Drainage Area 6 to move, store, and process rock, sand, and other aggregate materials. These materials are not covered or under any roof so all activities and materials at that part of the facility are exposed to stormwater. Additionally, RISG uses sprinklers and pipes to add water to the areas where it stores piles of materials at the site, making stormwater discharges from this area all the more likely. Stormwater and other waters

exposed to the piles of materials and industrial activities at the site necessarily pick up pollutants including total suspended solids and sand. And the piles of materials, sprinklers, pipes, hoses, industrial equipment, and any ditches or channels that are used for or result from drainage at the site are point sources. *See* 33 U.S.C. § 1362(14), 40 C.F.R. § 122.2. RISG violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging pollutants and industrial stormwater from Drainage Area 6 to the Willamette River on every day since April 10, 2014 on which more than 0.1 inches of precipitation fell or falls at the facility. These violations are ongoing.

The limited information available to NEDC indicates RISG may also be violating Section 301(a) of the CWA by discharging pollutants and industrial stormwater to the Willamette River from other point sources at the facility, including from two stormwater outfalls on the west side of the property, as well as from a drain leading to an underground pipe at the north end of the facility that then conveys pollutants and industrial stormwater to a City of Portland storm drain. As previously explained, because information regarding the locations of any other point sources is available to or known by RISG, but not available to NEDC, NEDC hereby notifies RISG that any point source discharge of pollutants or industrial stormwater from the facility violates Section 301(a) of the CWA and NEDC intends to sue for all such violations occurring at the site whether or not specifically described herein.

E. Discharges of Pollutants and Stormwater Associated with Industrial Activity to the Willamette River from Barges, Cranes, Docks, and Related Equipment.

RISG also violated and is violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging industrial stormwater and pollutants, including sand, rock, roofing granules, aggregate, and other materials produced at or transported to or from the facility, to the Willamette River from the facility grounds, barges located at the facility, and/or the crane, the dock, and the material loading and unloading activities that occur on the west side of the facility. The facility grounds, barge, crane, dock, and any related equipment and activities are point sources and any materials discharged from those machines, areas, or activities are pollutants. Discharges of pollutants from these areas and activities occurred on March 11, 2016, on every day since April 10, 2014 that RISG moved or transferred materials at the facility or from a barge, vessel, or piece of equipment to the facility, and on every day since April 10, 2014 that pollutants previously deposited into the river remain there. Additionally, unpermitted discharges of industrial stormwater from barges at the facility and from these activities and areas occurred and are occurring every day since April 10, 2014 that more than 0.1 inches of precipitation falls at the facility. These violations are ongoing.

III. PARTY GIVING NOTICE

The full name, address, and telephone number of the party giving this notice is:

Northwest Environmental Defense Center
10015 S.W. Terwilliger Boulevard
Portland, Oregon 97219
Telephone: (503) 768-6673

IV. ATTORNEYS REPRESENTING NEDC

The attorneys representing NEDC in this matter are:

Maura Fahey
Crag Law Center
3141 E Burnside Street
Portland, Oregon 97214
Telephone: (503) 525-2722

Paul Kampmeier
Kampmeier & Knutsen PLLC
811 First Avenue, Suite 468
Seattle, Washington 98104
Telephone: (206) 858-6983

V. CONCLUSION

The alleged violations described in this notice of intent to sue are ongoing and violate Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). RISG is in ongoing violation of an effluent standard or limitation as that term is used in the CWA. At the conclusion of the 60-day notice period, NEDC intends to file a lawsuit against Ross Island Sand & Gravel Co. under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, for the violations alleged herein. Each of the above-described violations subjects RISG to a civil penalty and the current maximum daily penalty assessment for each violation is \$53,484. In addition to civil penalties, NEDC will seek injunctive relief to prevent further violations and such other relief as is permitted by law, including recovery of NEDC's costs, attorneys' fees, and expert witness fees. See 33 U.S.C. §§ 1365(a) and (d).

The above-described violations reflect the information currently available to NEDC. NEDC intends to sue for all violations, including those yet to be uncovered, those committed after the date of this Notice of Intent to Sue, and those occurring at any other properties that are owned or operated by RISG and contiguous or adjacent to the facility. During the 60-day notice period, NEDC will be willing to discuss settlement and effective remedies for the violations alleged in this letter. If you would like to pursue settlement discussions in the absence of litigation, we suggest you initiate discussions within 10 days of receiving this notice so the parties can meet and discuss effective remedies for the violations alleged herein before costs of suit become prohibitive. NEDC does not intend to delay the filing of a complaint if discussions are ongoing when the notice period ends.

Crag Law Center



By: _____
Maura C. Fahey

Kampmeier & Knutsen PLLC



By: _____
Paul A. Kampmeier

Attorneys for Northwest Environmental Defense Center

CERTIFICATE OF SERVICE

I, Maura Fahey, declare under penalty of perjury of the laws of the United States that I am counsel for Northwest Environmental Defense Center and that on April 10, 2019, I caused copies of the foregoing Notice of Intent to Sue Under the Clean Water Act to be served on the following by depositing it with the U.S. Postal Service, postage prepaid, via certified mail, return receipt requested:

Managing Agent Ross Island Sand & Gravel Co. 4315 S.E. McLoughlin Boulevard Portland, Oregon 97202	Mr. Randall H. Steed, President Ross Island Sand & Gravel Co. P.O. Box 82249 Portland, Oregon 97282
Managing Agent Ross Island Sand & Gravel Co. Tait Plant 2611 S.E. 4th Avenue Portland, Oregon 97202	Mr. Ankur H. Doshi, Registered Agent Ross Island Sand & Gravel Co. 6605 SE Lake Rd. Portland, Oregon 97222
Mr. Andrew Wheeler, Administrator U.S. Environmental Protection Agency Office of the Administrator Mail Code: 1101A 1200 Pennsylvania Avenue NW Washington, D.C. 20460	Mr. Chris Hladick, Regional Administrator U.S. Environmental Protection Agency, Region 10 Mail Code: RA-210 1200 Sixth Avenue Seattle, Washington 98101
Mr. Richard Whitman, Director Oregon Department of Environmental Quality 700 N.E. Multnomah Street, Suite 600 Portland, Oregon 97232-4100	

Executed this 10th day of April, 2019 at Portland, OR.


Maura Fahey